

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 8, 2011

TO : Alvin P. Blyer, Regional Director
Region 29

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Asbestos, Lead & Hazardous Waste Laborers'
Local 78 (Midway Jewish Center)
Case 29-CC-1620

This Section 8(b)(4)(B) case was submitted for advice as to whether the Union violated Section 8(b)(4)(i)(B) of the Act by handbilling in the presence of an inflatable rat outside the entrance of a neutral employer. We agree with the Region that the charge should be dismissed, absent withdrawal, because there is insufficient evidence that the Union's conduct was directed at employees rather than the public.

Briefly, this case concerns a renovation project at Midway Jewish Center (Midway) that began in November 2010 and is scheduled to be completed in February 2012. Midway hired a general contractor, T.G. Nickel & Associates, to manage the project. T.G. Nickel then hired a non-union subcontractor, New York Insulation, to perform the asbestos abatement work on the project. The Union's protest in this case involves Midway's use of New York Insulation, a company which the Union claims is substandard and unqualified to perform the asbestos-removal work.

On April 12, 2011,¹ the Union began handbilling, in the presence of a large inflated rat, about 15 feet from Midway's main (and only) driveway entrance. The men and the rat have been present every weekday since that date, and on all but one Saturday since April 30, usually from about 8:00 a.m. until about 2:00 or 3:00 p.m. The rat has a large sign hanging from it, stating:

DEATH COMES EARLY IF YOU BREATHE ASBESTOS. Midway Jewish Center has hired a substandard company to perform DEADLY ASBESTOS ABATEMENT. New York Insulation is a company with a long history of violating the laws that keep their workers and the public safe from asbestos exposure. Exposure

¹ All subsequent dates herein are in 2011.

to Asbestos Causes Cancer. One Fiber is all it takes.

The sign then directs the reader to call Midway's rabbi (and provides his name and telephone number) to tell him to "hire only responsible contractors for this hazardous work." At the bottom of the sign, in much smaller print, it reads: "We are appealing only to the public. We are not seeking to induce any person to cease work or refuse to make deliveries." Two men have been present with the rat, either standing near it or sitting in a truck parked near the rat, distributing leaflets to passersby. The leaflets contain the same information as the sign on the rat. The Union representatives have been more active in their handbilling on Saturdays, whereas on other days they typically sit in their truck and sometimes talk on their cell phones.

When the men and rat showed up on the first two days of Passover, Midway's Executive Director and rabbi explained to them that this was a holy day and asked them to remove the rat. The men refused and proceeded to hand out leaflets to many of the worshippers on their way in and out of the driveway to the synagogue. A similar exchange occurred when the men and the rat showed up for the first time on a Saturday, the Jewish Sabbath. On two or three occasions, one of the Union representatives told the Executive Director that if Midway called the Union's business agent, they could perhaps work out a deal if Midway would sign something agreeing to never use New York Insulation again. Midway did not follow up on those conversations.

New York Insulation finished their abatement work on May 20 but will be returning later this summer to perform more work on a different aspect of the project. The men and the rat continue to be present.

In *Brandon Medical Center*,² the Board recently held that the display of a large inflatable rat near the entrance to a secondary employer did not violate Section 8(b)(4)(ii)(B) because it was not tantamount to picketing and was not otherwise coercive. Although there was no Section 8(b)(4)(i)(B) allegation in that case, the Board stated, in *dicta*, that "signals" by protesters to third parties in a secondary labor dispute are not unlawful "unless the third party to whom the 'signal' is directed

² *Sheet Metal Workers Local 15 (Brandon Medical Center)*, 356 NLRB No. 162 (May 26, 2011).

are employees of secondary employers, as opposed to the general public, and the signal is to cease work.”³ The Board noted that the rat display in that case was not used as any form of “signal” to employees of Brandon or any other employer to cease work, but rather was directed to members of the public, including hospital visitors.⁴

We agree with the Region that the evidence in this case does not support an 8(b)(4)(i)(B) violation. There is no evidence that the conduct was specifically aimed at any employees of any neutral employer. The facility has only one driveway entrance, and Midway never set up a reserve-gate system. There is no evidence that any Union representatives singled out or confronted any employees coming to work at the site or that any worker refused to perform work or make deliveries. And the Union’s presence and increased handbilling activity on Saturdays, when no renovation work was being performed on the project, further suggests that the Union’s conduct was directed toward the public. Although there was some shouting by the Union representatives, there is no evidence as to what they were shouting, and it does not appear it was aimed at any of the workers but rather at passersby. Moreover, the sign on the rat and the leaflets distributed by the Union specifically stated that they were not seeking to induce any workers to cease work. Thus, even assuming that the Union’s conduct had a “cease doing business” object, the conduct was not unlawful under Section 8(b)(4)(i)(B) because it was directed at the public and not the employees of any neutrals on the site.

Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

³ *Id.*, slip op. at 4.

⁴ *Id.* The Board also noted that there was no evidence that any employee ceased work as a result of the rat display. *Id.*, slip op. at 4 n.14.